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Recent Decisions: Constitutional Law - Equal Protection - Residency Requirements [*Shapiro v. Thompson*, 394 U.S. 618 (1969)]

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facts, decisions like *Sleeman* will "conform to a static logic" of stare decisis, but they will fall short of "substantive justice."

RICHARD E. HAHN

CONSTITUTIONAL LAW — EQUAL PROTECTION — RESIDENCY REQUIREMENTS

Shapiro v. Thompson, 394 U.S. 618 (1969).

The freedom to move from state to state unimpeded by barriers is a right most travelers within the United States take for granted. Occasionally, however, state legislatures have employed subtle methods to prevent people from entering their borders. Through the enactment of statutory restrictions burdensome to those wishing to immigrate, states may discourage the entrance of unwelcome newcomers, while avoiding the public censure which would be engendered by more blatant forms of exclusion such as barbed wire or armed guards. When challenged, such statutes have consistently been struck down by the United States Supreme Court. Thus, in 1941, a California statute that imposed a criminal penalty for transporting an indigent into the state was unanimously struck down as an infringement on the exercise of the right to travel.[1] Moreover, as evidenced by its invalidation of a $1 per passenger tax levied by Nevada upon interstate common carriers,[2] the Supreme Court has refused to tolerate restrictions on the right to travel even where the deterrent effect is slight.

In the recent case of *Shapiro v. Thompson*,[3] the Court again considered the constitutionality of statutes whose provisions allegedly deterred the free movement of individuals between states. At issue were the 1-year residency requirements imposed by Connecticut,[4] the

[1] Edwards v. California, 314 U.S. 160 (1941).

[2] Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868).

[3] 394 U.S. 618 (1969). *Shapiro* is a combination of several similar cases from Connecticut, the District of Columbia, and Pennsylvania. For a synopsis of the facts of each case, see note 9 *infra*.

[4] CONN. GEN. STAT. ANN. § 17-2c (Supp. 1969), *formerly* § 17-2d (Supp. 1967), provides:

> When any person comes into this state without visible means of support for the immediate future and applies for aid to dependent children under chapter 302 or general assistance under part I of chapter 308 within one year from his arrival, such person shall be eligible only for temporary aid or care until arrangements are made for his return, provided ineligibility for aid to depen-

District of Columbia,[5] and Pennsylvania[6] as a condition for welfare eligibility. Unlike some previous legislative attempts to burden interstate travel, the statutes under attack in *Shapiro* exacted no *direct* penalty from an indigent entering or residing in the state. Nevertheless, by denying access to public assistance for 1 year, the statutes had the effect of discouraging an indigent from leaving a state where he qualified for financial aid. The majority observed that the challenged statutes classified all welfare applicants into two groups, distinguishable only by their length of residence. Applicants who had lived within the state for less than 1 year were denied the benefit of permanent public assistance.[7] Affirming the decisions of three federal district courts,[8] the Supreme Court held that residency requirements which precluded otherwise eligible applicants from obtaining either Aid to Families with Dependent Children (AFDC) or

dent children shall not continue beyond the maximum federal residence requirement.

[5] D.C. CODE ANN. § 3-203 (Supp. V, 1966), provides in part:
Public assistance shall be awarded to or on behalf of any needy individual who either (a) has resided in the District for one year immediately preceding the date of filing his application for such assistance; or (b) who was born within one year immediately preceding the application for such aid, if the parent or other relative with whom the child is living has resided in the District for one year immediately preceding the birth; or (c) is otherwise within one of the categories of public assistance established by this chapter . . . .

[6] PA. STAT. ANN. tit. 62, § 432(6) (1968) provides:
Assistance may be granted only to or in behalf of a person residing in Pennsylvania who (i) has resided therein for at least one year immediately preceding the date of application; (ii) last resided in a state which, by law, regulation or reciprocal agreement with Pennsylvania, grants public assistance to or in behalf of a person who has resided in such state for less than one year; (iii) is a married woman residing with a husband who meets the requirement prescribed in subclause (i) or (ii) of this clause; or (iv) is a child less than one year of age whose parent, or relative with whom he is residing, meets the requirement prescribed in subclause (i), (ii) or (iii) of this clause or resided in Pennsylvania for at least one year immediately preceding the child's birth. Needy persons who do not meet any of the requirements stated in this clause and who are transients or without residence in any state, may be granted assistance in accordance with rules, regulations, and standards established by the department.

[7] In each case the welfare applicants met the test for *residence* in their jurisdictions; however, they did not meet the *length of residence* required for welfare assistance. 394 U.S. at 627.

[8] Basing the right to travel on the privileges and immunities clause of the 14th amendment, the lower court in Thompson v. Shapiro, 270 F. Supp. 331 (D. Conn. 1967), held that the 1-year residency requirement for welfare applicants was unconstitutional as an abridgement of the right to interstate travel and a denial of equal protection. Harrell v. Tobriner, 279 F. Supp. 22 (D.D.C. 1967), struck down the residency requirement of the District of Columbia because the court could find no reasonable purpose served by it. In Smith v. Reynolds, 277 F. Supp. 65 (E.D. Pa. 1967), the court could find no purpose for a residency requirement except that the state was attempting to exclude indigents. Such a purpose was clearly improper because it imposed a barrier to the exercise of the right of interstate travel, a right described by the court as "inherent in the notion of a unified nation." *Id.* at 68.

Aid to the Permanently and Totally Disabled constituted a burden upon the right to free interstate travel.[9] Because appellants could offer no governmental purpose for the residency requirements sufficiently compelling to warrant interference with a constitutional right, the Court held that the statutes violated the equal protection clause of the 14th amendment.

Statutes challenged under the equal protection clause have traditionally been upheld by the Supreme Court provided they are founded upon a reasonable basis.[10] However, when exercise of a fundamental right is discouraged or prevented through legislative classification, such statutes will be upheld only if the state meets the increased burden of showing a compelling governmental interest.

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[9] Shapiro v. Thompson, 394 U.S. 618, 627 (1969). Appellee Thompson, an unwed mother of one child and unable to work because of pregnancy, moved from Massachusetts to Connecticut in June 1966 to live with her mother. Two months later, Miss Thompson applied for and was denied AFDC because she had not fulfilled the 1-year residency requirement imposed by Connecticut on persons entering the state without visible means of support. Appellee Harrell, after moving from New York to Washington, D.C., was denied welfare eligibility until she had resided in the District for 1 year. Pregnant and in ill health, appellee Legrant was denied AFDC for herself and her two children when she moved from South Carolina to the District of Columbia to live with a brother and sister. Moving from Arkansas to Washington, D.C., where she had lived as a child, appellee Brown and her two children were unable to obtain financial aid. Appellee Barley had entered the District of Columbia in March 1941, and was committed 1 month later to a mental hospital where she remained for 15 years. Because the time spent in the hospital did not count toward fulfilling the residency requirement, appellee Barley could not be released to a foster home, since such an arrangement depended on her receiving Aid to the Permanently and Totally Disabled. Pennsylvania, meanwhile, was denying aid on the basis of unfulfilled residency requirements to appellee Smith and her five children, who had moved from Delaware to Pennsylvania in order to live with her father, and to appellee Foster and her four children who had left Pennsylvania in 1965 and returned in 1967. 394 U.S. at 621-27.

Although the fifth amendment contains no explicit equal protection clause, the Court applies the fifth amendment due process clause to discriminatory congressional action in much the same way it applies the 14th amendment equal protection clause to state action. When the Court struck down state segregation of public schools in Brown v. Board of Educ., 347 U.S. 483 (1954), as violative of the equal protection clause of the 14th amendment, it used the due process clause of the fifth amendment to outlaw congressionally imposed segregation in the District of Columbia, commenting that such segregation amounted to discrimination "so unjustifiable as to be violative of due process." Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

[10] The traditional test for validity of a statute which classifies state citizens into groups for purposes of separate treatment is the reasonable basis test — the state must show that the classification was created not arbitrarily, but for a reason. Almost any reason will do. *See, e.g.*, Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1941) (statute forbidding advertising vehicles on the street, but excepting from this prohibition vehicles carrying advertising of the business of the owner, upheld); Tigner v. Texas, 310 U.S. 141 (1940) (affirming state antitrust laws that excluded farmers for the reason that they were traditionally independent and not likely subject to illegal organization); Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 (1937) (affirming on the ground of administrative convenience a statute which taxed only employers of eight or more persons).

Before concluding that a constitutionally protected, fundamental right had been improperly infringed, the *Shapiro* Court examined the source and the nature of the right to travel in order to select the applicable standard under which to test the validity of the residency requirements.

Because the right to travel is not explicitly mentioned in the Constitution,[11] there has been frequent disagreement as to the source of the right. The privileges and immunities clause of article IV,[12] the privileges and immunities clause of the 14th amendment,[13] the commerce clause,[14] and the due process clause of the fifth amendment[15]

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[11] *See* Z. CHAFEE, THREE HUMAN RIGHTS IN THE CONSTITUTION 185 (1968), wherein the author suggests two possible reasons for the omission. First, the Drafters may not have wished to include special protection for this right; second, the Drafters believed it to be encompassed elsewhere in the Constitution. In light of the Drafters' ultimate ban on state tariffs, it is unlikely that they would have allowed states to restrict "free ingress and egress" of persons. The second interpretation seems, therefore, the more reasonable. *See* New York v. O'Neill, 359 U.S. 1, 12 (1959) (Douglas, J., dissenting).

[12] Corfield v. Coryell, 6 F. Cas. 546, 551-52 (No. 3230) (C.C.E.D. Pa. 1823), was the first judicial recognition of the right to travel, wherein this right was characterized, in dictum, as one of the fundamental privileges and immunities of citizens under article IV. Although this characterization of the right to travel was confirmed in Ward v. Maryland, 79 U.S. (12 Wall.) 418, 430 (1871), article IV is generally interpreted not as granting any privileges of national citizenship, but rather as preventing a state from discriminating against citizens from other states in favor of its own citizens. *See* Shapiro v. Thompson, 394 U.S. 618, 666 (1969) (Harlan, J., dissenting); Hague v. CIO, 307 U.S. 496, 511 (1939); Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 77 (1873).

[13] Mr. Justice Field and Mr. Justice Bradley, dissenting in the Slaughter-Houses Cases, 83 U.S. (16 Wall.) 36, 97, 116 (1873), analogized to the interpretation of the privileges and immunities clause of article IV in Corfield v. Coryell, 6 F. Cas. 546 (No. 3230) (C.C.E.D. Pa. 1823), and contended that the 14th amendment's privileges and immunities clause was intended to protect the rights of national citizens against state intrusion.

Concurring in Edwards v. California, 314 U.S. 160 (1941), Justices Douglas, Black, Murphy, and Jackson hesitated to ascribe the freedom of travel to the commerce clause as the majority did and maintained that the movement of *persons* should occupy a more protected position within the 14th amendment that the movement of *things*.

One author has observed that reliance on the 14th amendment leads to the unlikely conclusion that the Constitutional Convention did not intend to preserve the "free ingress and egress" clause of the Articles of Confederation. Z. CHAFEE, *supra* note 11, at 190-91. *See* 2 W. CROSSKEY, POLITICS AND THE CONSTITUTION 1119 (3d ed. 1965), wherein the author argues that shortly after its enactment, the 14th amendment's privileges and immunities clause was rendered completely useless by the failure of the majority of the Court to apply it in the *Slaughter-House Cases*, and thereafter to any case which has been before the Court since its enactment, except in one case since overruled.

[14] In Edwards v. California, 314 U.S. 160 (1941), a majority of five justices held that passage from state to state was protected from state interference by the commerce clause. For a discussion of *Edwards* in relation to Mr. Chief Justice Warren's dissenting opinion in *Shapiro*, see note 18 *infra*. In Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964), and Katzenbach v. McClung, 379 U.S. 294 (1964), the Court affirmed the power of Congress to remove obstructions to interstate travel resulting from discrimination by restaurant and motel owners.

[15] Since the commerce clause places no restrictions on Congress and the 14th amend-

at various times have been held to be the source of the right. In spite of this disagreement as to the exact source of the right, the Court has been overwhelmingly in agreement that the right to travel is at least a constitutionally guaranteed right.[16] The majority and two dissenting opinions in *Shapiro* similarly reflect this notion of a constitutional right and also echo the historical conflict over the source.

That the right to travel was grounded on the commerce clause seemed evident to Mr. Chief Justice Warren in his dissenting opinion, and therefore conclusory of the applicable standard by which to judge the challenged statutes.[17] Because the commerce clause empowers Congress to impose any reasonable regulatory scheme on interstate commerce, a rational statute providing for residency requirements could constitutionally impose some limitation on travel.[18]

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ment does not apply to Congress, the Court has based freedom to travel on the due process clause of the fifth amendment in order to scrutinize congressionally imposed restrictions on leaving the United States. *See* Aptheker v. Secretary of State, 378 U.S. 500 (1964); Kent v. Dulles, 357 U.S. 116 (1958).

[16] United States v. Guest, 383 U.S. 745, 757-59 (1966); New York v. O'Neill, 359 U.S. 1, 12-16 (1959) (Douglas & Black, JJ., dissenting); Twining v. New Jersey, 211 U.S. 78, 97 (1908); Williams v. Fears, 179 U.S. 270, 274 (1900); Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868); Passenger Cases, 48 U.S. (7 How.) 282 (1849).

[17] Acting pursuant to the commerce clause, Congress can impose any regulatory scheme, provided there exists a rational basis for the scheme promotive of interstate commerce. Katzenbach v. McClung, 379 U.S. 294, 304-05 (1964). Mr. Chief Justice Warren viewed section 402(b) of the Social Security Act of 1935, ch. 531, § 402(b), 49 Stat. 627 (1935), *as amended*, 42 U.S.C. § 602(b) (1964), as manifesting a congressional intent to encourage states to concentrate their resources on welfare programs, thereby improving the collective lot of welfare recipients and ultimately resulting in increased interstate commerce. That section provides:

> The Secretary [of Health, Education and Welfare] shall approve any [state assistance] plan which fulfills the conditions specified in subsection (a) of this section, except that he shall not approve any plan which imposes as a condition of eligibility for aid to families with dependent children, a residence requirement which denies aid with respect to any child residing in the State (1) who has resided in the State for one year immediately preceding the application for such aid, or (2) who was born within one year immediately preceding the application, if the parent or other relative with whom the child is living has resided in the State for one year immediately preceding the birth.

While the majority position maintained that the 1-year residency requirement of section 402(b) was designed to deter states from imposing lengthy residency requirements, the Chief Justice interpreted the legislative history as evincing a congressional intent to authorize residency requirements of up to 1 year. Thus, each challenged statute in *Shapiro* was either congressionally enacted or authorized. The majority commented that if the constitutionality of section 402(b) were at issue the 1-year requirement therein would be unconstitutional because Congress cannot authorize the states to violate the equal protection clause. In reply, Mr. Chief Justice Warren stated: "The Court, after interpreting the legislative history in such a manner that the constitutionality of § 402(b) is not at issue, gratuitously adds that § 402(b) is unconstitutional." 394 U.S. at 653.

[18] The majority in *Shapiro* chose not to deal with the question of the extent of congressional power to regulate travel if the source of the right is found in the commerce clause as suggested in Edwards v. California, 314 U.S. 160 (1941). While *Edwards*

In a separate dissenting opinion, Mr. Justice Harlan, while agreeing that the right to travel was "fundamental," rejected the majority's application of a compelling interest test to the challenged statutes. Locating the source of the right in the due process clause of the fifth amendment, he concluded that this provision adequately immunized the right to travel from congressionally enacted or authorized state infringements without the necessity of expanding the use of the compelling interest test. His consistent position has been to limit application of a compelling interest test to racial classifications that deny equal protection. Thus, a rational state purpose for the residency requirements would justify any reasonable statutory restriction on freedom of travel.[19]

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indicated that Congress could regulate the travel of individuals between states, the Court did not pass upon the scope of such power. *See id.* at 176. One cannot discount the possibility that freedom to travel exists as a fundamental personal liberty independent of the commerce clause. *Edwards* employed the latter as a protection of the free flow of persons, in treatment similar to the protection given free movement of goods, rather than speaking in terms of the right to travel as a personal freedom. Thus, while movement of persons constitutes part of the flow of interstate commerce which is protected from state interference by the commerce clause, travel may also, as the majority in *Shapiro* decided, merit a higher level of protection from both state and national encroachments because of its fundamental nature inferred from the constitutional scheme of government.

Mr. Chief Justice Warren did not rely on the *Edwards* case as authority for his position that the commerce clause is the source of freedom to travel, noting that it is inapplicable because it deals with state-imposed rather than congressionally-imposed restrictions. Instead he based his conclusion on two types of previously upheld congressional restrictions on interstate travel: safety regulations imposed on interstate carriers and criminal penalties for crossing state lines for criminal purposes. To support his argument the Chief Justice cited Texas & Pac. Ry. v. Rigsby, 241 U.S. 33 (1916) (Congress may require that railroads comply with safety regulations prescribed for railroad cars used in interstate commerce, whether or not the cars are actually in use at the time of the violation), and United States v. Zizzo, 338 F.2d 577 (7th Cir. 1964), *cert. denied*, 381 U.S. 915 (1965) (Congress may lawfully restrict the crossing of state borders for criminal purposes). Perhaps because the purpose of these restrictions was to promote public safety — an interest which is usually compelling [*see* notes 30-33 *infra* & accompanying text] — and because he applied the *reasonable basis* rather than the *compelling interest* test, Mr. Chief Justice Warren mustered further authority for Congress power to regulate interstate travel. He found authority in Zemel v. Rusk, 381 U.S. 1 (1965), for balancing the extent of the restriction on travel against the necessity for the imposition of the restriction, and concluded that Congress reasonable basis for the imposition of residency requirements (to encourage states to enter the federal welfare program, thereby increasing the scope of the benefits) outweighed any deterrent effect such requirements may have had on freedom to travel. 394 U.S. 618, 649-50. The *Zemel* Court based the right to travel on the fifth amendment due process clause, since the congressional restriction was not on interstate travel, but rather involved refusal of the Secretary of State, as authorized by Congress, to grant passports for foreign travel. It is somewhat curious that the Chief Justice relied upon *Zemel* to justify the application of a rational basis test to the statutes, since, as the majority's spokesman in *Zemel*, his language there suggested the application of a *compelling state interest test* where restrictions on free travel were involved. 381 U.S. at 15-16.

[19] 394 U.S. at 671. Mr. Justice Harlan put the word "fundamental" in quotation marks, suggesting that while he believed that the right to travel freely is fundamental

The majority, citing *United States v. Guest*[20] as authority for the proposition that the right to travel is fundamental to our scheme of federalism, did not search for a specific source within the Constitution, but proceeded directly to apply a compelling interest test to the statutes in question.[21] Examining all reasons and interests offered by the states, the majority found that the purposes were impermissible,[22] irrational,[23] too drastic although valid,[24] or were spurious, in-

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in the usual meaning of the adjective, he did not wish to use the word in the sense that its use automatically required a showing of compelling state interest to justify a statute inhibiting the right. Mr. Justice Harlan has consistently maintained that wholesale invalidation of state statutes may occur if the Court requires a higher purpose for state legislation where it affects fundamental rights. *See* Harper v. Board of Elections, 383 U.S. 663, 683-86 (1966) (Harlan, J., dissenting), wherein the Court struck down a Virginia poll tax on state elections because it encroached upon the fundamental right of voting. Mr. Justice Harlan suggested that he would have joined the majority in applying the stricter test had racial discrimination resulting from the poll tax been found by the Court. For Mr. Justice Harlan's interpretation of the 14th amendment based on its historical origins, see Reynolds v. Sims, 377 U.S. 533, 589 (1964) (dissenting opinion).

[20] 383 U.S. 745 (1966). In that case, appellees were indicted under section 241 of the Crimes and Criminal Procedure Act of 1948, 18 U.S.C. § 241 (1964), on several charges, including interference with the right of Negro citizens to engage freely in interstate travel by restricting them from free use of the streets and highways of Georgia. In reversing the lower court's dismissal of this charge, the Court characterized freedom to travel as a fundamental constitutional right. This case may be distinguished from *Shapiro*, however, because it involved restrictions placed on travel by individuals rather than by Congress. The extent of Congress power to regulate travel under different sections of the Constitution was, therefore, not a question facing the Court in *Guest* when it decided there was no need to identify the source of the right. 383 U.S. at 757-58.

[21] The Court occasionally has read into the Constitution rights which are not specifically enumerated. This is particularly true where the Court, as in *Shapiro*, has employed the equal protection clause in order to strike down discriminatory statutes. In Skinner v. Oklahoma, 316 U.S. 535 (1942), for example, the Court stated that a statute permitting sterilization of habitual criminal offenders, but excluding embezzlers, tax evaders, and political offenders, was subject to "strict scrutiny" because it deprived the offender of the basic liberty to marry and have children — a liberty "fundamental to the very existence and survival of the race." *Id.* at 541.

Where voting rights are curtailed, discriminatory classifications are also strictly scrutinized. Recognition of voting rights as fundamental has been similar to the Court's recognition of the right to travel. Existence of a right to vote has repeatedly been inferred from the 15th and 19th amendments. *E.g.*, Gray v. Sanders, 372 U.S. 368 (1963); United States v. Classic, 313 U.S. 299 (1941); *Ex parte* Yarborough, 110 U.S. 651 (1883). On the basis of historical acceptance of voting as a fundamental right, the Court, in Reynolds v. Sims, 377 U.S. 533 (1964), meticulously scrutinized Alabama's apportionment procedures, in much the same manner as *Skinner* carefully examined impairment of a sensitive area of human rights. *Id.* at 561-62. However, the Court found the apportionment completely lacking in rationality and could have found it invalid on that basis alone. *Id.* at 568.

Thus, when laws infringe upon fundamental rights inferred from the Constitution, ample precedent exists for requiring a state to satisfy the compelling interest test.

[22] Pennsylvania and Connecticut's principal justification — a need to protect the state fiscal integrity from an influx of indigents — was dismissed as a clearly impermissible consideration because a statute enacted to bar people from the state constitutes a direct burden on freedom to travel. 394 U.S. at 629. Alternatively, the appellants argued that the requirements served to exclude those indigents who would enter the

asmuch as the state did not actually rely on the residency requirement for the suggested objective.[25]

In fashioning their analyses the majority and dissenting Justices drew upon concepts from the flexible body of law which has developed concerning the proper relationship of constitutional rights to state interests. Those rights *specifically enumerated* in the Constitution, such as found in the first amendment,[26] the fourth amendment search and seizure clause,[27] self-incrimination in the fifth,[28] and the sixth amendment right to counsel,[29] historically have been viewed as fundamental. Absent an overriding, compelling state interest there is no justification for denying an individual or a class of people such rights. In the area of public safety there is such a compelling interest. The protection of the country from potential enemies during wartime,[30] the control of organizations notorious for acts of subversion and violence,[31] and the protection of the public while on

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state solely to obtain higher welfare benefits. The Court declared this objective to be no more permissible than an attempt to exclude all indigents. *Id.* at 631.

[23] The Court rejected Pennsylvania's alleged interest in encouraging the prompt entry of indigents into the state labor force as being without a rational basis for imposing a 1-year waiting period. *Id.* at 637-38.

[24] While the Court agreed that prevention of fraud was a valid interest, there was no need to use a 1-year waiting period when less drastic means were available to minimize that hazard. *Id.* at 637. For similar reasoning, see Shelton v. Tucker, 364 U.S. 479 (1960), where the Supreme Court, in invalidating an Arkansas statute requiring teachers to submit an annual affidavit listing all organizations to which they belonged, stated:

> [E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. *Id.* at 488 (footnote omitted).

[25] In spite of the claims that the residency requirement would aid in budget planning and provide an objective method of testing bona fide residency, none of the appellants had ever taken a census of new residents for future planning, nor had they utilized the period as the sole criteria for determining residency since that was determined through separate inquiry by welfare authorities. 394 U.S. at 634-36.

[26] Cantwell v. Connecticut, 310 U.S. 296 (1940) (freedom of religion); De Jonge v. Oregon, 299 U.S. 353 (1937) (freedom of assembly); Near v. Minnesota, 283 U.S. 697 (1931) (freedom of press); Gitlow v. New York, 268 U.S. 652 (1925) (freedom of speech).

[27] Mapp v. Ohio, 367 U.S. 643 (1961).

[28] Malloy v. Hogan, 378 U.S. 1 (1964).

[29] Gideon v. Wainwright, 372 U.S. 335 (1963).

[30] *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944), wherein a statute enacted during World War II prohibiting United States citizens of Japanese descent from residing in designated military areas was found to be justified as an emergency protection against sabotage.

[31] Protecting the free flow of interstate commerce from disruption by violent political strikes has been held to be a sufficiently compelling governmental interest to uphold a statute requiring union officers to file affidavits that they are not Communists. American Communications Ass'n v. Douds, 339 U.S. 382 (1950). State interest in gathering

state property[32] are among those vital governmental interests wherein regulations may permissibly infringe on individual rights.[33] On the other hand, nonenumerated rights and privileges normally are protected only by the general prohibitions of the 14th amendment due process and equal protection clauses. To comport with the requirements of equal protection, a state classification scheme granting or denying benefits to a group of people traditionally has been justified by a mere showing that it was not arbitrarily imposed. Ordinarily, any reasonable basis will justify such a statute, especially in the area of economic business classifications where the courts have been indulgent toward proffered state interests.[34]

Between these conceptual poles exists an area where legislative transgression of individual liberty may be apparent, but where no constitutionally enumerated right has been violated. Within this sphere lie certain statutory classifications, principally those based on unalterable characteristics such as race and national origin, whose inherently suspect nature necessitates the use of the compelling interest test to guard against the probability of invidious discrimination. The Court has further held that classifications, not in themselves suspect, may result in the infringement of a nonenumerated right so fundamental to constitutional concepts of liberty that the same high degree of protection accorded enumerated, fundamental rights is warranted. These two areas of inquiry constitute the two branches of the compelling interest test as it is applied under the equal protection clause.[35]

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information on Communist organizations outweighs the fundamental first amendment right to association as long as the information sought bears a reasonable relationship to the state purpose. Gibson v. Florida Legislative Investigating Comm., 372 U.S. 539 (1963). A state may validly require the Ku Klux Klan to submit a list of its rank and file members because the organization is known for its acts of lawlessness. Bryant v. Zimmerman, 278 U.S. 63 (1928).

[32] The Supreme Court has approved a statute requiring religious groups to obtain a permit before holding ceremonies in a public park. Poulos v. New Hampshire, 345 U.S. 395 (1953). A New Hampshire statute requiring licensing of all parades, including picket lines, was held constitutional in Cox v. New Hampshire, 312 U.S. 569 (1941). The Court's rationale in allowing these restrictions on first amendment rights was that such statutes promote peace and convenience on public highways and parks. *See* Cameron v. Johnson, 390 U.S. 611 (1968) (Mississippi validly exercised its police power in enacting antipicketing laws designed to keep entrances and exits to public buildings open and unobstructed).

[33] Investigation of the competency of teachers has also been suggested as a compelling state interest. *See* Shelton v. Tucker, 364 U.S. 479 (1960).

[34] *See* note 10 *supra.*

[35] *See* Shapiro v. Thompson 394 U.S. 618, 658-63 (1969) (Harlan, J., dissenting), where Mr. Justice Harlan outlined the development of the two branches of the compelling interest test. This test has been applied where the Court finds that statutorily created classifications are inherently suspect. *See* note 39 *infra* & accompanying text.

Under the first branch of this test, *statutory classifications* can be visualized on a spectrum, ranging from the inherently suspect categories of race, national origin, and wealth, through less strictly scrutinized categories such as age and sex, down to normal business classifications. Nonenumerated *rights and privileges* are similarly scaled. The rights of procreation, suffrage, and, following *Shapiro*, the right to travel, already held by the Court to require application of the compelling interest test, head this scale, while business activities occupy the lowest position. Between these extremes range rights and benefits such as education, welfare, and the right to work, which are accorded varying degrees of importance. Current pressures of public interest and sentiment can, and do, vary the relative positions of both the classifications and the rights. In *Brown v. Board of Education*,[36] the Court's reason for invalidating public school segregation exemplifies the change in relative merit of a state-supported benefit which has become, through shifting public attitude, a right approaching the importance of a fundamental right. Observing that education had assumed a role of paramount importance in preparing a child for success in life, the Court declared that it had become elevated to the status of a right, the equal enjoyment of which was denied by segregation.[37] Although the *Brown* Court did not consider whether education is a fundamental right, the Court might, in the future, so categorize it in view of today's necessity for education.[38]

Using this dual approach to balancing individual rights against state interests, the Court requires that the state show a compelling interest where either rights or classifications or both are at the top of their respective scales.[39] Lower positions on both scales only require a state to meet the less stringent test of rationality. Such analysis can be found in *Harper v. Board of Elections*,[40] where a classification by wealth restricting the right to vote was measured

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The second area where the Court has required that the state meet the burden of showing a compelling interest is where the classifications result in the denial of a fundamental right. *See* note 21 *supra.*

[36] 347 U.S. 483 (1954).

[37] *Id.* at 492-93.

[38] For a discussion of a similar change in the status of welfare, see note 44 *infra.*

[39] When subjecting statutes to strict scrutiny in earlier equal protection cases, the Court required that the states show an "overriding statutory purpose" [McLaughlin v. Florida, 379 U.S. 184 (1964)], or a "pressing public necessity" [Korematsu v. United States, 323 U.S. 214 (1944)], terms apparently synonymous with the test of compelling state interest articulated in *Shapiro.*

[40] 383 U.S. 663 (1966).

against the state's interest in promoting intelligent voting. Analogizing classifications founded on wealth and property to racial classifications, the Court subjected a Virginia poll tax to strict scrutiny. Since the inevitable effect of the tax was to exclude indigents from the polls, the Court struck down the tax on the ground that wealth bore no relation to the voters' competence.[41]

Cases also may arise where the classification, while not inherently suspect, must nevertheless be strictly scrutinized because the statute infringes on a fundamental right.[42] Acting pursuant to its police power, for example, a state may have legitimate reasons for classifying convicted criminals according to their crimes. In *Skinner v. Oklahoma*,[43] however, a classification exempting embezzlers, political offenders, and the like from the sterilization inflicted on habitual criminals, was strictly scrutinized by the Court to determine whether the state had an "overriding state purpose" justifying interference with the fundamental right of procreation.

Once the state begins statutory classification outside the economic sphere, the Court, in considering the validity of such statutes, must attempt to balance state interests against individual rights and liberties. On the side of personal rights and liberties, a variety of factors may influence the Court to favor the individual. Using the foregoing analysis, it would appear that the *Shapiro* majority did more than merely elevate the right to travel to a preeminent position that would require a compelling interest test. Although focus was upon the fundamental right of travel, it is possible that the *Shapiro* Court has impliedly included within this spectrum a right to a minimum standard of living through welfare.[44] These two rights would

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[41] Similarly, a racial classification and the denial of the fundamental rights of marriage and procreation, unjustified by an overriding state purpose, prompted the Court to invalidate Virginia's miscegenation statute. Loving v. Virginia, 388 U.S. 1 (1967).

[42] Occasionally a statute infringes upon two fundamental rights. In Aptheker v. Secretary of State, 378 U.S. 500 (1964), prohibition on travel outside the United States through denial of passports to known Communists violated both the right to travel and the first amendment freedom of association. Although the government was acting in the interests of national security, the Court would not tolerate this abridgement of liberty, requiring that Congress find less drastic means to achieve its purpose. 378 U.S. at 512-13.

In his dissent in *Shapiro*, Mr. Chief Justice Warren indicated his belief that state interests were outweighed in *Aptheker* only because of the combined violation of two fundamental rights. 394 U.S. at 649-50 (Warren, C.J., dissenting).

[43] 316 U.S. 535 (1942).

[44] The majority in *Shapiro* indicated that, like education, welfare may be rising on the scale of human activities to a position where its denial by statutory classification will constitute a significant factor in the Court's balancing technique. In holding that a discrimination denying equal protection existed, the Court noted that the effect of the classification was that "the second class [was] denied welfare aid upon which may depend

be sufficient for imposition of the stricter test of compelling interest, rather than merely a showing of a rational basis.[45]

The complexity of the balancing method of resolving equal protection controversies appears to necessitate a case by case analysis of competing state interests and individual rights rather than the application of a precise set of legal principles and definitions, thus rendering somewhat speculative the outcome of future constitutional challenges to state-imposed residency requirements.[46]

As the majority suggests, the balance may at times weigh in favor of the state.[47] For example, where members of a profession are obliged to meet certain requirements before obtaining a license to practice within a state, the state is generally conceded to have more at stake than administrative efficiency. The state interest in promoting public safety may necessitate the use of residency requirements to insure that only qualified and competent professionals practice within the state.[48] Balanced against this apparently compelling interest is the theoretical infringement on the individual's right to travel which results from any residency requirement. Although the

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the abilities of the families to obtain the very means to subsist — food, shelter, and other necessities of life." 394 U.S. at 627.

For additional discussion of the possible existence of a previously unrecognized right, see *Developments in the Law — Equal Protection*, 82 HARV. L. REV. 1127 (1969).

[45] In dictum, the Court doubted that the appellants could even meet these lower standards:

> We conclude therefore that appellants in these cases do not use and have no need to use the one-year requirement for the governmental purposes suggested. Thus, even under traditional equal protection tests a classification of welfare applicants according to whether they have lived in the State for one year would seem irrational and unconstitutional. 394 U.S. at 638 (footnoted omitted).

Mr. Justice Harlan, dissenting, would take a more lenient view of the alleged governmental interests. For example, although the states had not actually relied upon the residency requirements for budget planning, such a purpose was reasonable. *Id.* at 673.

[46] In American Commuters Ass'n v. Levitt, 279 F. Supp. 40 (S.D.N.Y. 1967), the plaintiffs attempted to challenge all of New York's residency requirements, relying on Thompson v. Shapiro, 270 F. Supp. 331 (D. Conn. 1967). The court held that the plaintiffs did not have standing to challenge the statutes because they were Connecticut residents who merely worked and paid taxes in New York. The constititionality of the resdiency requirements was never considered by the court.

[47] The majority in *Shapiro* stated:

> We imply no view of the validity of waiting-period *or* residence requirements determining eligibility to vote, eligibility for tuition-fee education, to obtain a license to practice a profession, to hunt or fish, and so forth. Such requirements may promote compelling state interests on the one hand, or, on the other, may not be penalties upon the exercise of the constitutional right of interstate travel. 394 U.S. at 638 n.21 (emphasis added).

[48] *See* Pannam, *Discrimination on the Basis of State Residence in Australia and the United States*, 6 MELBOURNE U.L. REV. 105, 128-29 (1967). *Cf.* Shelton v. Tucker, 364 U.S. 479, 485 (1960), wherein the Court acknowledged that a state has a vital concern in the competence and fitness of those whom it hires to teach in its schools.

Shapiro Court's suggestion that refusing welfare payments to newcomers constitutes a deprivation of the necessities of life can be weighed as a factor on the side of *welfare recipients*,[49] it is doubtful whether this suggestion can be construed to elevate the area of *professional* licensing above the economic sphere, since a 1-year waiting period ordinarily would not deprive the applicant of his *entire* means of living. In this latter context, the state's case is strengthened by the presentation of a significant interest in the residency requirement, while the individual's is weakened by the fact that his welfare — a factor ancillary to the right to travel — is not entirely jeopardized. Thus, the balance may shift in favor of the state.

In the area of voting, however, particularly where a presidential election is at issue, the state may be unable to justify interference with individual rights through residency requirements. Considerations in favor of the individual are formidable. Residency requirements force the individual to choose between two fundamental rights — voting and the right to travel. If he wishes to vote the individual must remain where he is qualified; by changing his residence, he must forfeit his right to vote until new residency requirements have been satisfied. While the creation of an informed local electorate may constitute a sufficiently meritorious interest with regard to state and local elections, this purpose has no logical application to elections on a national level.[50] However, in light of *Shapiro*, even in local elections such a purpose may possibly justify only minimal residency requirements when balanced against the dual infringement of fundamental rights resulting from the requirements.

The leading case on residency requirements in presidential elections is *Drueding v. Devlin*,[51] where the Supreme Court affirmed per curiam a federal district court's holding that Maryland's residency requirements were reasonably enacted to facilitate voter identification and to prevent fraud. Since similar state justifications were offered in *Shapiro* and subsequently dismissed, the future validity of residency requirements for voting appears rather doubtful in spite of the majority's disclaimer of any views on the validity of such requirements.[52] The Court, however, recently declined an oppor-

[49] 394 U.S. at 627. Although the majority merely adverted to the deprivation of necessities, the implication is that such deprivation would be considered a factor augmenting the welfare recipient's case. *See* 394 U.S. at 655, 661 (Harlan J., dissenting).

[50] Schnidhauser, *Residency Requirements for Voting and the Tensions of a Mobile Society*, 61 MICH. L. REV. 823, 828 (1963).

[51] 234 F. Supp. 721 (D. Md. 1964), *aff'd per curiam*, 380 U.S. 125 (1965).

[52] *See* note 47 *supra*.

tunity to overrule *Drueding* and further undermine all state residency requirements. In *Hall v. Beals*,[53] a Colorado statute requiring residency of 6 months prior to voting in a presidential election had been upheld in the state courts on the authority of *Drueding*. By the time the case reached the Supreme Court, however, Colorado had reduced its requirement from 6 to 2 months, thereby removing the appellant from the class of voters disfranchised by the statute and rendering the problem moot.[54]

One of the most difficult interpretative problems facing the courts is whether a statute that imposes residency requirements upon students attending state supported universities is permissible in light of *Shapiro*. The apparent state purpose in establishing such requirements is to grant tuition benefits only to the state's taxpayers and to prevent an influx of out-of-state students from imposing a drain on the state's educational facilities. Since virtually the same state purposes were rejected in *Shapiro* because of the restrictions which the statutes imposed upon the right to travel,[55] it is questionable whether such justifications would suffice in the area of public education. It is plausible, however, that some of the alternative state interests advanced in *Shapiro* might be given greater weight when presented as justifications for residency requirements in the area of education, particularly where they are actually relied upon as an objective test of residence and where the detriment resulting from infringement on free travel is less than where welfare is denied. The need to qualify immediately for low-cost education is so lacking in exigency that its denial may result in no real burden on interstate travel.[56] Opposing the state's interests, however, is not only the suppositional violation of free travel, but also the individual's interest in obtaining a college education. The right to an education, at least at the lower levels, was considered significant

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[53] 396 U.S. 45 (1969).

[54] Mr. Justice Brennan dissented, noting that Colorado's 2-month requirement was too short to ever permit a voter to reach the High Court while he was still disfranchised. *Id.* at 51. In a separate dissenting opinion, Mr. Justice Marshall declared that the Court should have relaxed the traditional rules of mootness in order to have a vehicle by which to overrule the erroneous application of the reasonable basis test in *Drueding*. *Id.* at 51-52.

[55] *See* notes 22-25 *supra*.

[56] Such an argument is suggested by Green v. Department of Pub. Welfare, 270 F. Supp. 173 (D. Del. 1967), where the court examined the *quality* of the privilege rather than the degree of state interest served by the residency requirements. The *Green* court held insufficient, for purposes of welfare, state interests previously held sufficient to justify residency requirements for voting. Attempting to resolve this inconsistency, the court stated that "the need for food, clothing, and lodging has an aspect of immediacy which differentiates it in kind from the right to vote." *Id.* at 178.

in *Brown v. Board of Education*.[57] Whether, in view of shifting cultural priorities, the necessity for higher education has increased to such a degree as to be considered an important or fundamental right remains an open question.

In an era of prolonged and spiraling inflation indigents may not be capable of changing their status. *Shapiro* reflects not only the High Court's diligence in safeguarding a historic right to travel but also its sensitivity to current social problems and rights or privileges closely tied to travel. Whether this is the role of the judicial or legislative branch is debatable, but certainly *Shapiro* portends further changes in other areas of residency requirements.

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[57] 347 U.S. 483 (1954).